SUPREME COURT, U. S.

SEP 12 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 468

SEGUROS TEPEYAC, S.A. COMPANIA MEXICANA DE SEGUROS GENERALES, *Petitioner*

v.

JAMES L. JERNIGAN

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTION

The jurisdictional time for filing a Petition for Writ of Certiorari in a civil case is ninety (90) days from the date of the judgment (in this case ninety (90) days from the date that the Petition for Re-hearing was denied, to-wit May 7, 1969), as provided in 28 U.S.C. 2101(c) (App. 1 hereto attached.)

OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the United States Court of Appeals for the Fifth Circuit attached to Petitioner's Petition as Appendix "A" is No. 25651 in the United States Court of Appeals for the Fifth Circuit.

The original suit of the injured party against the insurance company is *Bostrom* v. *Seguros Tepeyac, S.A. Compania Mexicana de Seguros Generales,* N.D. Texas, Ft. Worth Div. 1963, 225 F. Supp. 222, and *Seguros Tepeyac, S.A. Compania Mexicana* v. *Bostrom* (5 Cir. 1965), 347 F. 2d 168.

The original judgment in the suit of Bostrom v. Jernigan was entered in the U.S. District Court, N.D. Texas, Dallas Division, in the amount of $270,000, on February 12, 1962, being Cause No. 8536. No appeal was taken from this judgment.

REASONS FOR DENYING THE WRIT

I.

As indicated in the Petition for the Writ, the judgment of the Court of Appeals was entered on April 15, 1969; and re-hearing was denied on May 7, 1969. The judgment of April 15, 1969 and Mandate are attached hereto as Appendix 2. Copy of original Judgment of the U.S. District Court is attached hereto as Appendix 3. The time for filing a Petition for Writ of Certiorari expired on August 5, 1969. The Petition here was filed on August 13, 1969. There has been no extension of time and no tolling of the period of limitations. It has often been held by this Court that the period of time for filing a Petition for Writ of Certiorari is jurisdictional. *Fed. Trade Comm.* v. *Minn.-Honeywell Regulator Co.,* 344 U.S 206, 211; *Hartford Accident*

and Indemnity Co. Bunn (Miss. 1932), 285 U.S. 169 at 177; *Toledo Scale Co.* v. *Computing Scale Co.*, (1923) 261 U.S. 399 at 418; *Rust Land, etc. Co.* v. *Jackson* (Miss. 1919), 250 U.S. 71 at 76; *Hill* v. *Chicago & E.R. Co.* (Ill. 1891), 140 U.S. 52.

II.

Petitioner states that the main question presented is the way the Court of Appeals has applied the Declaratory Judgment Act in that it held that Jernigan, the insured, may collect not only the $10,100 paid by him to Bostrom the injured party, but also all sums he may pay Bostrom in the future. That Judgment is found at R. 525-528, and App. 3.

In claiming error, Petitioner relies upon the case of *Smith* v. *Transit Casualty Co.*, (E.D. Texas 1968) 281 F. Supp. 661. That case does not support Petitioner's position. In the *Smith* case, recovery was denied as to a particular payment on the ground that the transaction was a sham, was not bona fide, and should not be approved. In the instant case, the bona fides of this transaction was litigated extensively, and the jury found specially that the payment was made and was made in good faith. (R. 525)

Strangely enough, the U.S. Court of Appeals, Fifth Circuit, relies also upon the *Smith* case where declaratory relief was granted despite the fact that the original payment was found to be a sham payment and the Court there stated:

> "It would be a useless waste of time and effort for the Plaintiffs to be required to come back into this court seeking an order of reimbursement each time a payment is made on the excess judgment . . . Therefore, in addition to a money judgment

> . . . . , this court deems this an appropriate situation to grant a declaratory judgment. The remedy is fully available in Texas and is also an important element of Federal practice." 281 F. Supp. 670 (App. A. 19a)

III.

Petitioner argues that the doctrine of collateral estoppel was wrongfully applied by the lower court since the parties were not identical. The Court of Appeals deals effectively with that argument, commencing at Page 16-A of Appendix "A" to the Petition, although it is obvious that the Petitioner, or the printer misplaced, the last line of p. 17a or the last line of p. 16a.

IV.

Finally, Petitioner argues that the court did not properly resolve and apply the provisions of the Texas and Mexico statutes of limitations. The court simply held, which is apparent from a reading of the two Opinions, that the cases of *Linkenhoger* v. *American Fidelity & Casualty Co.*, 260 S.W. 2d at 885-886, and *Universal Automobile Insurance Co.* v. *Culberson,* 86 S.W. 2d 727, Reh. Den'd, 87 S.W. 2d 475, read together, hold that there was no cause of action in this type of situation, in the insured, unless and until he had paid something on the judgment against him. Since the Court of Appeals dealt with this argument in some detail, it is deemed unnecessary to review the rationale in this Brief. (App. A. 18a-20a).

As for the Mexico Statute of Limitations, it seems abundantly clear that limitation statutes of the Republic of Mexico have nothing whatever to do with this type of suit, which is a tort action based upon

negligence, that the negligence occurred in the state of Texas, that the tort was completed in the state of Texas, and that the lawsuit brought was not brought upon the policy itself, in contract, but rather in tort, in the state of Texas, where the cause of action arose. The U.S. District Court for the Northern District of Texas and the Court of Appeals for the Fifth Circuit had previously determined that Texas law and not Mexican law applied to the original action, in tort, by the injured party against the insurance company, *Seguros Tepeyac, etc. v. Bostrom,* 347 F. 2d 168 at 175.

CONCLUSION

In short, the Petition for Writ of Certiorari herein should be denied because:

A. It has been filed too late.

B. Under Rule 19 of the Supreme Court Rules, which provides the guidelines, Petitioner has not shown how this decision of the Court of Appeals of the Fifth Circuit is in conflict with the decision of any other Court of Appeals in the same matter (no citations having been given), or has decided an important state question in conflict with applicable state law, or has decided an important question of Federal law which has not been settled by this Court, or has decided a Federal question in a way in conflict with applicable decisions of this Court, or in any other manner calls for review by this Court.

Respectfully submitted,

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316 Three Penn Center Plaza
Philadelphia, Pennsylvania 19102
Attorney for Respondent

APPENDIX

APPENDIX 1

§ 2101. Supreme Court: time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2283 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time

to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. June 24, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104.

APPENDIX 2

(Filed July 2, 1969)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 25651

D. C. Docket No. CA 4-772

SEGUROS TEPEYAC, S.A. COMPANIA MEXICANA DE SEGUROS GENERALES, *Appellant,*

versus

JAMES L. JERNIGAN, *Appellee.*

Appeal from the United States District Court for the Northern District of Texas.

Before GEWIN, PHILLIPS* and GOLDBERG, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

---

*Judge Harry Phillips of the Sixth Circuit, sitting by designation.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellant pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

April 15, 1969

Issued as Mandate: June 30, 1969

A true copy
Teste: Edward W. Wadsworth
Clerk, U. S. Court of Appeals,
Fifth Circuit

By Lylia G. Comberrel
Deputy

New Orleans, Louisiana

June 30, 1969

APPENDIX 3

Judgment

Filed Aug. 31, 1967.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

Civil Action 4-772.

James L. Jernigan, *Plaintiff*,

v.

Seguros Tepeyac, S. A. Compania Mexicana de Seguros Generales, *Defendant*.

On the 21 day of August 1967 came on to be heard the above cause and came the Plaintiff in person and by his attorney and the Defendant by its representative and at-

torney, and all parties having announced ready for trial, a jury was selected consisting of Fred Bosworth, Foreman, and eleven other jurors, and the evidence having been submitted and the argument having been heard, and the Court's charges having been given to the Jury, the Jury retired to consider its verdict and in response to the questions given, the Jury gave the following answers:

Question No. 1—Do you find from a preponderance of the evidence that the Defendant Insurance Company was guilty of negligence in not initiating and attempting to bring about a settlement of the claim of Bostrom against the insured, Plaintiff Jernigan, within the $5,000.00 limits of the public liability policy in question?

Answer: "It was negligent."

Question No. 2—Do you find from a preponderance of the evidence that the failure of the Defendant Insurance Company, in not initiating and attempting to bring about a settlement of the claim of Bostrom against Plaintiff Jernigan, was a proximate cause of the judgment for $270,000.00 in favor of Bostrom and against Jernigan and Sullivan, jointly and severally, which has been admitted in evidence in this case.

Answer: "It was."

Question No. 3—Do you find from a preponderance of the evidence that the insured, Jernigan, was guilty of contributory negligence in failing to communicate to the Defendant Insurance Company the $5,000.00 offer of settlement on the Bostrom claim against him and Sullivan.

Answer: "He was not."

Question No. 4—(If you answer "He was" to the foregoing question, then, but not otherwise, answer the following question.) Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the judgment for $270,000.00 in favor of Bostrom

and against Jernigan and Sullivan, jointly and severally, which has been admitted in this case.

Answer: (Not answered.)

Question No. 5—Do you find from a preponderance of evidence that there was an offer made to the Plaintiff Jernigan, by the attorney for the injured party, Bostrom, in the month of June 1960, to settle the claim of Bostrom against Jernigan for the sum of $5,000.00.

Answer: "Yes."

Question No. 6—Do you find from a preponderance of evidence that the Plaintiff Jernigan made a bona fide payment of the sum of $10,100.00 for the benefit of Bostrom and to his credit, in partial satisfaction of the $270,000.00 judgment.

Answer: "Yes."

And the Court finding that answers to said questions entitle the Plaintiff to the following relief,

It is therefore, Ordered, Adjudged and Decreed that the Plaintiff James L. Jernigan do have and recover of the Defendant Seguros Tepeyac, S. A. Compania Mexicana de Seguros Generales the sum of ten thousand one hundred dollars ($10,100.00) together with interest thereon at the rate of six percent (6%) per annum from date and,

It is further Ordered, Adjudged and Decreed that the Plaintiff James L. Jernigan do have and recover from the Defendant Seguros Tepeyac, S. A. Compania Mexicana de Seguros Generales such sums as and when he may hereinafter pay on the judgment recovered against him by Maynard Bostrom until said judgment is fully satisfied. The Plaintiff is also awarded his costs against the Defendant, for all of which let execution issue.

Entered this 30 day of August 1967.

ERNEST GUINN,
United States District Judge